

OCT 30 1997

Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

In the Matter of)	
)	
Preemption of State and Local Zoning and)	MM Docket No. 97-182
Land Use Restrictions on the Siting,)	
Placement and Construction of Broadcast)	
Station Transmission Facilities)	

COMMENTS OF PALM BEACH COUNTY, FLORIDA

The Board of County Commissioners of Palm Beach County ("County"), by and through its attorneys, hereby submits its comments in response to the Federal Communication Commission's ("Commission") Notice of Proposed Rule Making ("Notice") issued in the above-captioned proceeding.¹ The County asks that the Commission decline to adopt the proposed rule which serves to preempt state and local laws, regulations and restrictions on the siting of broadcast transmission facilities. The County respectfully notes that the Petitioner's Proposed Preemption Rule ("rule") (Appendix B to the Notice), if adopted, would directly infringe upon the responsibility of the County Commission to safeguard the public health, safety and welfare by exercising authority over the siting and construction of the broadcast transmission facilities, including compliance with zoning regulations, building requirements and other applicable local regulations. The County also objects to the proposed time frame, as set forth in the proposed rule, for County review of applications for construction or modification of broadcast tower facilities, as the time provided is insufficient for the

¹ Preemption of State and Local Zoning and Land Use Restrictions on the Siting, Placement and Construction of Broadcast Station Transmission Facilities, MM Docket No. 97-182, Notice of Proposed Rule Making (rel. August 19, 1997) ("Notice").

County to conduct necessary reviews, hold quasi judicial public hearings and issue applicable permits. Furthermore, the County objects to the provision in the proposed rule whereby the Commission shall conduct hearings on declaratory relief where a television operator is adversely affected by action of a local government.

The Commission seeks comments on both the preemption by the Commission of state and local laws for the construction of broadcast transmission facilities and on the proposed time frame submitted by the Petitioners, which establishes the times within which local governments must act on requests regarding broadcast facilities. These issues are addressed in turn.

I. The Commission Should Decline to Preempt State and Local Laws

Palm Beach County objects to the proposed rule, which would serve to preempt Palm Beach County land-use regulations, zoning codes, building regulations, or similar regulations, with regard to the siting of broadcast towers, “unless the County could demonstrate that the regulation is reasonable in relation to a clearly defined and expressly stated health or safety objective . . . and federal interests in allowing federally authorized broadcast operators to construct broadcast transmission facilities in order to render their service to the public, and fair and effective competition among competing electronic media.”² The Commission should not, via its rule making authority, preempt all state and local regulations that might affect broadcasting transmission towers, and impose the burden on local government to demonstrate the reasonableness of its regulations.

Congress in enacting the Telecommunications Act of 1996 (“Act”) preempted local laws and local government authority in only limited circumstances. Section 332(c)(7) of the Act (codified

² Petitioner's Proposed Preemption Rule at (b)(2). Notice, Appendix B,

at 47 U.S.C. Sec. 332(c)(7)), provides for a limited preemption of state and local government decisions regarding wireless towers. By providing for a limited and specific preemption in Section 332(c)(7), Congress' intent in remaining silent on preemption in the remainder of the Act, was that local government was to retain authority over decisions regarding placement and construction of facilities and to preserve for local governments their role of safeguarding the public health, safety and welfare. Furthermore, Congress declined to establish in Section 332(c)(7), a uniform time frame for local government responses to personal wireless service facilities. Local governments were directed to act on requests for authorization to construct or modify personal wireless service facilities "within a reasonable period of time after the request is duly filed . . . taking into account the nature and scope of such request." 47 U.S.C. Sec. 332(c)(7) (emphasis added). Congress declined to establish a rigid, standard time frame for all local governments to adhere to, as the Petitioners request that the Commission do in the rule at issue. There is no statutory authority for the preemption of local regulations and the imposition of a uniform time frame for local government actions.

Congress' intent in not preempting local government regulation is also evidenced by Section 253 of the Act (codified at 47 U.S.C. Sec. 253), which provides that "no state or local statute or local regulation . . . may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service. . . . If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation or legal requirement that violates (a) or (b), the Commission shall preempt the enforcement of such statute, regulation or legal requirement to the extent necessary to correct such violation or inconsistency." Again, the intent of Congress was to not grant to the Commission the authority to preempt all local regulations (zoning, building, etc) regarding tower

placement. Unless local government action “prohibits the ability of any entity to provide telecommunications services,” the Commission can only preempt the enforcement of that particular regulation, and, even then, only to the extent necessary. Congress did not intend that the Commission have the authority to preempt all local zoning and building requirements, across the nation, and impose a standard procedure and time frame in lieu of local regulations and review.

The Petitioners’ proposed rule is overly broad, insofar as it seeks to preempt all state and local regulations, regardless of when the digital television (“DTV”) implementation is required to be completed. For example, DTV is required by May 1, 1999 in the top ten markets in the United States, but not required until May 1, 2002 for all commercial markets aside from the top thirty markets. The Petitioner seeks to preempt all state and local regulations and adopt an accelerated review process even though, arguably, such an accelerated process may only be necessary in certain markets. Although the Petitioners acknowledge that only certain towers will need to be constructed to meet the DTV construction schedule, the proposed rule is expanded to include “the siting of new broadcast transmission facilities or the alteration or relocation of existing broadcast transmission facilities by television and radio station stations whose operations have been authorized by the Commission”. (Notice, Appendix B) The Petitioners’ stated aim in facilitating the “rapid deployment of DTV services” is expanded to include all broadcast transmission facilities, which may not be subject to the implementation schedule. The proposed rule is overly broad, and the stated aims of the Petitioners can be met by less onerous means than by preempting all local government regulations. Palm Beach County does not fall within the top thirty markets in the United States and the DTV implementation is not required until 2002. The telecommunications industry has more than adequate opportunity to comply with the Palm Beach County regulations and process.

II. Petitioner's Procedural Framework and Time Frame Do Not Provide Adequate Opportunity for County Review of Broadcast Facility Applications

The Petitioner's proposed rule suggests that a state or local government must act on any request for authorization to place, construct or modify broadcast transmission facilities no later than twenty-one (21), thirty (30) or forty-five (45) days after a written request is filed for such authorization, depending upon the action requested. (Notice, Appendix B)

An application for the construction of a new broadcast transmission facility involves review of numerous issues on the part of local government in order to safeguard the public health and safety. In Palm Beach County, Florida, the following summarizes the typical actions and review process necessary for the grant of requisite permits to construct a transmission facility:

(1) Development Review Committee Approval. The Palm Beach County Development Review Committee ("DRC") is composed of staff from County departments and other agencies.³ The DRC's role is to review site plans for conditional use exceptions, subdivision plans, etc. A transmission facility would require a conditional use approval and, in some instances, rezoning. If an application is submitted on the deadline for acceptance by the DRC of applications, the members of DRC have thirty-five (35) days to review the submittal.

(2) Zoning Commission. The Palm Beach County Zoning Commission reviews DRC approvals and makes recommendations to the Board of County Commissioners on conditional uses and/or rezoning. This process takes a minimum of thirty (30) days from DRC approval.

³ The DRC is composed of staff from the following departments and agencies: Zoning, Building, Planning, Engineering, Health, Environmental Resources, Parks and Recreation, Airports, Water Utilities, Fire Rescue, Property and Real Estate Management, Housing and Community Development, School Board, and Lake Worth Drainage District.

(3) Board of County Commissioners. The Board of County Commissioners conducts public hearings and renders orders on conditional use and rezoning applications. This process takes a minimum of twenty (20) days from Zoning Commission recommendations.

(4) Development Review Committee Final Approval. If the Board of County Commissioners approves a conditional use, the matter is referred again to the DRC for final site plan certification. This process takes thirty-five (35) days from the deadline for DRC review.

(5) Variance. If a variance from the County regulations is required, a minimum of an additional forty-five (45) days will be required to submit an application and conduct a quasi judicial public hearing before the County's Board of Adjustments.

(6) Building Permits. Building permits are issued by the Building Department twenty (20) to thirty (30) days after a complete application is submitted.

From this cursory overview of the Palm Beach County review process, an application for a transmission facility is estimated to take approximately 140 - 215 days to process, from the time of the submission of a complete application to the granting of building permits. This time frame does not take into account additional time which may be necessary due to incomplete or faulty applications, postponements or continuances of hearings, additional public hearings being required (which are held once per month), appeals of decisions of the DRC or Zoning Commission, or other events which would serve to delay the process.

As is evident, the County cannot conduct a full review on the merits of a broadcast tower facility application, and ensure that the tower meets the various county regulations, if the County is given only 45 days to conduct a full review of the application, conduct public hearings on the issue, and issue building permits. If the construction of the tower were to entail rezoning, the County is

required, pursuant to Florida law, to give 30 days notice of the rezoning public hearing. Obviously, the County would not have sufficient time to act on the application if it is required to give 30 days notice of hearings, but has only 45 days to review and respond to the application. The accelerated review process proposed by the Petitioners does not take into account whether the television market at issue is in the top thirty in the United States (and thus has an earlier construction completion deadline), the size of the market at issue, the number of other tower applications which may be made and pending before the local government, and similar issues which serve to indicate that a uniform nationwide time frame for review is unnecessary and impractical. Palm Beach County is not within the top 30 markets in the nation, so implementation of DTV is not required until 2002. Given the fact that several towers have already been built in the County without the preemption of local regulations, and that the County is working with representatives of the telecommunications industry to enact mutually beneficial local zoning regulations, there is no need for the use of the nationwide, standard time frames in Palm Beach County.

III. The County Objects to the Commission Hearing Petitions for Declaratory Relief

In paragraph (2)(e) of the proposed rule, the Petitioners suggest that any television or radio operator adversely affected by any final action, or failure to act, by a local government, may petition the Commission for a declaratory ruling requesting relief. The County objects to this provision. It is an unfair burden for local governments to be forced to defend itself to the Commission, in unfamiliar procedures in Washington, DC, against nationwide broadcasters who routinely appear before the Commission. The proper venue for rulings for declaratory relief are the local courts. The County asks that the Commission decline to extend its jurisdiction to hear cases from around the country, especially considering the lack of statutory authority for it to do so.

CONCLUSION

For the foregoing reasons, the Commission should decline to adopt the Petitioner's proposed rule preempting state and local regulations and establishing a timetable for actions by local government upon applications for broadcast transmission facilities.

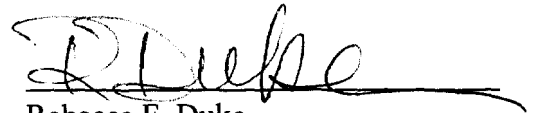
Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Rebecca F. Duke', with a long horizontal flourish extending to the right.

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CERTIFICATE OF SERVICE

I hereby certify that the original and nine true and correct copies of the foregoing and computer disk has been furnished by Federal Express this 19th day of October, 1997, to the Secretary, Federal Communications Commission, Washington D.C. 20554.



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cc: Susanna Zuerling, Policy & Rules Division, Mass Media Bureau, FCC
Burt Aaronson, Chairman and Members, Board of County Commissioners
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